No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1944

ANTHONY CRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

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PRELIMINARY STATEMENT

This brief is submitted in response to the order of this Court on June 12, 1944, directing reargument and providing:

> Further briefs and argument are desired as to the questions raised under the treason clause of the Constitution, particularly as to the meaning of "treason" and of "overt act" and as to the requirement that such overt act be proved by testimony of two witnesses; also as to whether each overt act submitted to the jury complied with the Constitutional requirement.

A full statement of the pertinent facts is contained at pages 4–22 of our brief submitted on

the prior argument, and there is no need for detailed restatement here. However, a brief summary of the nature of the case, and of the conflicting contentions of the parties, may be useful as a setting for the discussion of the legal issues.

Cramer, the petitioner, was indicted and convicted in the United States District Court for the Southern District of New York for that form of treason against the United States which consists, in the language of Section 3 of Article III of the Constitution, "in adhering to their Enemies, giving them Aid and Comfort." The indictment alleged ten overt acts, but at the conclusion of the evidence seven of these were withdrawn by the Government, and three only were submitted to the jury. The petitioner contends that no one of the three acts thus alleged and submitted was a sufficient "overt act" to support a conviction of treason under the Constitution. The sufficiency of each of them as a matter of law was, however, upheld both by the district court and by the circuit court of appeals in affirming the conviction. This question of the sufficiency of the overt acts lies at the root of the legal questions on which the Court has directed reargument.

The facts of the case, except in the matter of petitioner's intent, are little in dispute; indeed, most of them were proved not only by the Gov-

ernment's witnesses but by the petitioner himself, testifying in his own defense. The petitioner is an American citizen of German origin. For many years prior to 1941 he had been intimately associated with Werner Thiel, one of the eight German saboteurs whose conviction by a military court came before this Court in *Ex parte Quirin*, 317 U. S. 1. In March, 1941, Thiel, a thorough-going Nazi in his views, left for Germany in anticipation of war with the United States; and during his absence, at least down to November 1941, a friendly correspondence was maintained between him and petitioner.

In June, 1942, Thiel returned by German submarine, and promptly sought out his friend. The means by which their first rendezvous was arranged were somewhat mysterious, in that Cramer, by his own testimony, received an anonymous note directing him to meet an unknown "Franz from Chicago" at a stated time at the Grand Central Station in New York. He responded. "Franz" was Thiel, and the two spent some time together, both that evening and the next. During the second meeting they were joined for a part of the time by Kerling, who was the leader of the group of saboteurs with whom Thiel had landed in Florida. Following this meeting, Thiel, unknown to Cramer, was arrested. During the course of the next few days Cramer made several attempts to get in touch with Thiel.

From the time of the second meeting with Thiel, Cramer's movements were under constant surveillance, and four days later, after leaving a note for Thiel under a pseudonym, William Thomas, at the Commodore Hotel, he was approached by agents of the Federal Bureau of Investigation and questioned by them regarding Thiel. During the course of the interview he made specific false statements as to Thiel's identity and his movements, for the purpose of "trying to shield" his friend. Later in the course of the same interview he recanted these false statements.

So much is undisputed. As to the subject matter of Cramer's conferences with Thiel, and the extent of his knowledge of Thiel's mission, there is some conflict between Cramer's own testimony and the testimony of others as to what he told them about the conferences. The disparity of testimony is not great, however; at the least, it is conceded that Cramer learned from Thiel that he had come here from Germany, with a large sum of American money in cash; that he knew, or suspected, that Thiel had come clandestinely on some kind of mission for the German Government; that he offered to take charge of the money for Thiel; that during the course of their meeting on the second evening Thiel handed the money over to him, together with the money belt in which it had been carried; that he put a large part of

the money in his safety deposit box; and that he kept about $160 of it in his room so that Thiel could get at it quickly if necessary. Testimony by Norma Kopp, Thiel's fiancee whom at Thiel's request petitioner summoned to New York, and by the Federal Bureau of Investigation agents to whom he made a statement, attributed to him somewhat greater knowledge of Thiel's activities and purpose than he was willing to admit on the stand. However, he admitted without equivocation his false statements to the Federal Bureau of Investigation for the purpose of shielding Thiel's identity and movements, ascribing as motive a desire to protect Thiel from "trouble with the Draft Board."

Of the three overt acts submitted to the jury, two related to the meeting with Thiel on the second evening; the third related to the interview with the Federal Bureau of Investigation agents. Overt act 1 dealt with the portion of the second meeting at which Kerling also was present, alleging that at a given time and place Cramer "did * * * meet * * * confer, treat, and counsel with" Thiel and Kerling for the purpose of giving them aid and comfort as enemies of the United States. Overt act 2 dealt with the later portion of the same meeting, after Kerling left, alleging that at two places Cramer similarly "did accompany,

confer, treat and counsel with" Thiel as an enemy.[1] Overt act 3 (No. 10 in the original list) alleged five specific false statements to the Federal Bureau of Investigation agents regarding Thiel's identity and whereabouts; and regarding the source of the money in the safety deposit box, all made for the purpose of giving aid and comfort to Thiel as an enemy of the United States. In view of the judge's charge, that for conviction the jury must find that aid and comfort were extended to Thiel and Kerling not out of friendship, but "as enemies of the United States and agents of the German Reich", the treasonable intent with which these acts were performed must be taken as established by the verdict of the jury.

Thus the issue between the parties, at least on this reargument, narrows down essentially to a question of the legal sufficiency of the three overt acts under the Constitution of the United States. In his first brief the petitioner contended that the

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[1] Cramer, by appointment, met Thiel at the Twin Oaks Inn on Lexington Avenue. Shortly after they met, Kerling arrived. He stayed talking about an hour and a half. This conference with him and Thiel was the first overt act. After he left, Cramer and Thiel continued the conference, during the course of it paying their bill, walking down the street, and stopping in for a few minutes more at Thompson's Cafeteria. This continued conference, at both the Twin Oaks Inn and Thompson's Cafeteria, was the second overt act. Although it was not alleged in the indictment, the proof showed that it was during this continued conference that Thiel divested himself of the money belt and handed it over to Cramer, who carried it through the rest of the conference.

acts were legally insufficient in that they were not such acts "as of themselves, and unaided by any other evidence, manifest treason." In his brief on the reargument the petitioner proposes a new definition—that the overt act "must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury." It is not entirely clear whether the new definition is intended to supersede the old; plainly the two do not attempt to apply the same considerations in determining the legal sufficiency of overt acts in any given case. However that may be, we take issue with both definitions, and with petitioner's ultimate conclusion as to the insufficiency of the overt acts in this particular case. This issue between the parties, when analyzed in detail, evokes the several questions raised by the Court in its order for reargument, namely, (1) the meaning of treason; (2) the meaning of "overt act"; (3) the meaning of the requirement that such overt acts be proved by the testimony of two witnesses; and (4) whether each of the three overt acts submitted to the jury complied with the constitutional requirement.

These several questions cannot, we believe, profitably be separated for discussion. The "treason" and the "overt act" interlock; neither is meaningful without understanding of the other.

So with the two-witness requirement; though it is superficially a mere procedural safeguard applied to the proof of overt acts, search for its significance requires search for the significance of overt acts generally in the scheme of treason. And, since the case is a concrete conviction for treason, discussion of these broader questions must be shaped at least in part by reference to determination of the legal sufficiency of the particular overt acts here involved. The answers to all the questions posed by the Court, therefore, must be permitted to emerge from a comprehensive study and analysis of the origins and history of treason, as developed through constitutional and legislative provisions, judicial decisions, and comment by text-writers.

We have undertaken such a study and analysis of the origins and history of treason. Although the extraordinary paucity of competent modern secondary sources might suggest otherwise, the materials in the field are in fact voluminous. Moreover, since this case involves the first treason conviction considered by this Court in its history, we have thought it appropriate to present not merely the materials which appear directly relevant to the precise issues of this case, but also materials tending to show the absence of valuable precedent at particular periods of history, in order that the Court may have before it the fullest possible picture of the development of the law of treason. The results of research covering such

a range cannot be fully presented within the compass ordinarily appropriate to a brief, and we consequently submit them in the form of a series of appendices, which for historical background may be read independently of this brief, and to which we shall make continual reference in the course of our argument. A list of the appendices is set out in a footnote below.[2]

These appendices are not presented as necessarily expressing the views of the Government on the legal and historical questions considered therein. They have been prepared at the request of

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[2] APPENDIX A. *Civil and Canon Law Materials*
I. The Crime of High Treason from the Romans to the Second Half of the 18th Century.
II. Treasonable Crimes under the Criminal Codes of Continental Europe.
III. The Two-Witness Requirement in Canon Law.
APPENDIX B. *Anglo-American Materials*
Introduction and Bibliographical Note
I. Treason in England
1. Treatises
(a) Early English Treatises.
(b) Treatises Published in the 18th Century.
(c) Treatises Published in the 19th and 20th Centuries.
2. Statutory Evidence of English Policy Regarding Treason.
3. English Case Law Prior to 1790.
II. Treason in America
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the Solicitor General by persons in the main not connected with the Department of Justice, but believed to be fully qualified by training and experience in the respective fields assigned to them.[5] The authors of the appendices were requested to avoid argumentative support of any particular position, and to select material for inclusion or exclusion solely on the basis of its reliability and its relevance to the questions under review by the Court. At the same time we have recognized that the task of intelligently selecting material for these studies inevitably involves a

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[5] Parts I and II of Appendix A, dealing with treason in civil law, were prepared, respectively, by Dr. Elio Gianturco, Research Assistant to the Foreign Law Section of the Law Library of Congress, and Dr. V. Gsovski, Chief of the Foreign Law Section of the Law Library of Congress. Part III of Appendix A, dealing with the two-witness requirement in canon law, was prepared by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, and Honorary Consultant in Canon Law to the Library of Congress.

Appendix B, dealing with the history of treason in English and American law, was, with the exception of the section dealing with English case law prior to 1790, prepared by Willard Hurst, on leave as Associate Professor of Law, University of Wisconsin, whose services were made available through the courtesy of the Navy Department. The section on English case law prior to 1790, although revised and edited by Professor Hurst, was primarily prepared by attorneys on the staff of the Department of Justice.

The preparation of the appendices was made possible by the courtesy and cooperation of Professor Eldon R. James, Law Librarian of Congress, who freely made available both the facilities of the library and the extremely valuable services of many members of its staff.

factor of personal judgment on the part of the authors of the studies, and, further, that such studies would lose much of their value if the views of the authors as to the significance of the material with which they have dealt were eliminated. Consequently, we have chosen to present the studies to the Court in the form in which they were prepared and submitted to us, and we offer them as constituting in our judgment a fair, dispassionate, and informative analysis of the history of the law of treason. In so offering them we do not in any way assume responsibility for, or necessarily agree with, all the inferences drawn or the conclusions expressed by the authors.

Our own consideration of the relevant historical materials, both at first hand and as presented in the studies in the appendices, has satisfied us as to the general soundness of our position adopted on the original argument, and hence in this brief we shall contend again that all three of the overt acts submitted to the jury were legally sufficient and adequately proved, and that the petitioner was properly convicted of treason. In support of our argument we shall not only refer as occasion may demand to the material contained in the appendices, but shall for convenience of presentation restate in summary form those portions of the material which appear most directly relevant to the course of our argument.

ARGUMENT

INTRODUCTORY

In his first brief, the petitioner contended that overt acts, to be legally sufficient, must be acts which "as of themselves, and unaided by any other evidence, manifest treason" (Pet. I Br., p. 20).[1] Entirely apart from historical considerations, the application of this test sought in that brief affords no satisfactory demonstration of its soundness or practicability. As we pointed out in our first brief (I Br., pp. 32–34), the significance of any act—what it "manifests" to an observer—cannot be determined *in vacuo*, but must depend upon the extent of the observer's own knowledge, his perceptions, and his alertness to implications. Nor can the significance of an act as treason necessarily be perceived by even the most acute observer, for every act—even the obvious act of bearing arms with the enemy—is susceptible of explanation and justification in terms of purpose.[2] Petitioner's proposed test

[1] For convenient distinction, we refer herein to petitioner's first brief as "Pet. I Br.", and to his brief on reargument as "Pet. II Br." Our own original brief is referred to as "I Br.".

[2] Cf. *United States* v. *Schulze*, 253 Fed. 377, 379 (S. D. Cal., 1918), an Espionage Act case:

"Intent is a necessary element of this offense, notwithstanding the absence of the words 'willfully' and 'intent.' Words spoken in one set of circumstances may mean an entirely different thing from words spoken in another set of

may therefore be criticized as resting on a fundamental misconception of the nature of an act. Moreover, it is elementary that a treasonable intent—an intent to betray allegiance—is necessary to the crime of treason, so that if an overt act must "manifest" the treason in the sense used by petitioner it must in effect comprehend the entire crime, rendering superfluous, or at least merely corroborative, all proof extrinsic to the overt act itself. By the petitioner's test the overt act becomes no more than a prescribed method of proving the entire crime, rather than a distinct element of the crime.

It may be that analytical difficulties of this character are in part responsible for the petitioner's apparent abandonment of the test proposed in his original brief. Whatever the cause, the petitioner now advances an alternative test: that an overt act "must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case

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circumstances. If the American army are advancing and the Huns are retreating, and I say, 'We cannot always hope to win,' that is pessimistic. If the Huns are advancing, and the Americans are retreating, and I say, 'We cannot always hope to win,' that is optimistic. In order for the government to prove the crime, the government must give color to the words. One cannot look at these words uttered by the defendant, and say that they necessarily favor the cause of Germany. Some of the sentences would not convey that meaning at all, without intent being shown."

to the jury" (Pet. II Br., p. 5). As thus stated, the test assumes the very point at issue, since only by first determining what is a legally sufficient overt act can one determine whether the evidence warrants the submission of the case to the jury. The new test must presumably be read in the light of the petitioner's further contention that each of the acts here charged is insufficient as an overt act of treason because "it is not charged nor did the proofs establish that petitioner in fact gave any aid and comfort to the enemy", and that "as in the case of levying war, so in the case of adhering to enemies, mere preliminaries, such as attempts and conspiracies will not suffice" (Pet. II Br., p. 39).

The petitioner's new definition finds little support, and much opposition, in the English authorities on the law of treason prior to the adoption of the Constitution of the United States. The petitioner, however, discounts the English authorities in large part, on the theory that the constitutional definition adopted in the United States "created an entirely new pattern, which was never intended to include mere attempts or abortive conspiracies" (*ibid.*) And even assuming the relevance of the English authorities, the petitioner contends that the particular acts charged and proved here are still insufficient.

There is no easy answer to the question how far English doctrines of the law of treason

were intended to be incorporated into our constitutional definition, and the precise scope of the English law of treason by adhering to enemies is difficult to ascertain—being beclouded by loose language and often obscured by confusion with other types of treason with which we have no direct concern. Yet there is no conceivable doubt that the law of treason in the United States, both as embodied in the Constitution and as administered thereunder, has been profoundly influenced not only by English statute law—starting with the famous Statute of 25 Edw. III—but by the gloss placed on statute law by English judges and commentators such as Coke, Hale, Foster and Blackstone. Understanding of treason in America must begin—though it need not necessarily end—with a study of treason in England.

Accordingly, under Point I of our brief, which treats generally the nature of the crime of treason and the interrelationship of its elements to each other, we deal first with the law of treason as developed in England down to the latter part of the 18th century. Next we survey the American materials from the earliest times down to and including the adoption and ratification of the Constitution. In the light of the historical background thus developed, we review the construction which has been accorded by the courts to treason under the Constitution of the United States. Under Point II, we present our reasons for be-

lieving that the particular overt acts charged in this case satisfied the constitutional requirements developed under Point I, both as to intrinsic legal sufficiency and as to sufficiency of proof.

I

THE NATURE AND ELEMENTS OF THE CRIME OF TREASON AND THE SIGNIFICANCE OF THE TWO-WITNESS REQUIREMENT

A. *Treason in England down to 1800*

As reference to the early treatise writers shows,[6] the crime of treason under the English common law acquired at least some of its inspiration from the Roman *crimen laesae majestatis*. However, the divergence of the growths of the common law and civil law systems dulls the force of parallels between the two, and comparison thus serves chiefly to illustrate the different means by which different legal civilizations have sought to deal with the problem of the loyalty of the individual to the state and its rulers. For this purpose we set forth in Appendix A a short study of the crime of high treason under the civil law from the time of the Romans down to the modern European codes.[7]

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[6] See Appendix B, pp. 59, 61.

[7] Appendix A, Parts I and II. The primary significance of the study for our purposes lies in its clear showing of the importance which the modern European codes attach as a matter of policy to a broad, preventive attitude toward trafficking with foreign agents.

Study of treason under the common law begins, for all practical purposes, with the Statute of 25 Edw. III, than which, according to Coke, "except it be *Magna Charta*, no other Act of Parliament hath had more honour given unto it."[8] Modern judgment of the statute in operation has been less kindly,[9] but even modern critics have not called into the question the statute's profound effect upon the history of treason over the ensuing centuries.[10] Uncertain as its application may have been, and inadequate as its scope may have appeared in times of political turmoil, it is yet a legislative landmark—and the only one—which has stood in the field of treason for 600 years.[11] Its persisting influence in America in the 18th century is clearly revealed by the debates on the treason clause in the Constitutional Convention, as well as by the form of the typical basic treason statutes adopted in colonial and revolutionary times.

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[8] Coke, *Institutes of the Laws of England, Third Part* (5th ed. London, 1671), 2; Appendix B, p. 56.

[9] "The general effect of the whole is that the statute which has been so much praised, is really a crude, clumsy performance, which has raised as many questions as it can have settled, and which has been successful only when it was not required to be put in force." 2 Stephen 283; Appendix B, p. 132.

[10] See Appendix B, pp. 106, 116.

[11] See 2 Stephen 262–263; *cf. id.* 251; Appendix B, pp. 117–119, 132–133.

To comment upon the importance of the Statute of 25 Edw. III, however, is far from explaining just wherein its importance lay. Upon its face it resolved uncertainties of the common law, purporting to limit to seven those classes of treasons which might be so adjudged without prior resort to Parliament. In this sense, it was clearly restrictive, and its narrowness of scope is emphasized by the readiness with which additional treasons were created by Parliament in times of foreign wars and domestic tension. But the question remains how far within the framework of the seven accepted treasons a further restrictive policy is evidenced limiting the kinds of conduct which may be found treasonable, and the manner in which they may be proved. For four of the treasons—violating the king's companion, counterfeiting the king's privy seal, counterfeiting the king's money, or slaying the king's chancellor or one of his justices—their relative preciseness of definition may have made the answer easy; at least they need not concern us here. For us it is important only to interpret the Statute of 25 Edw. III as it relates to the three major treasons—compassing or imagining the death of the king; levying war against him, and adhering to his enemies, giving them aid and comfort. The meaning of these three treasons must be sought in the cases and in the analyses of the learned text-writers.

In the practical application of the statute, predominant over all the others was, of course, the treason of compassing or imagining the death of the king. Few cases may be found dealing exclusively with either the treason of levying war or that of adhering to enemies.[12] But from this it cannot be assumed that the latter two species of treason did not retain substantial independent significance,[13] nor that analogies from the treason of compassing may not be of assistance in their interpretation. The essential similarity in the elements of proof required under the three branches is affirmed by the frequency with which the same conduct was charged as treasonable under more than one branch in the same indictment.[14]

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[12] *Cf.* the comment of Stephen, referring to the treason of adhering: "Instances of this offence have been very rare in our history. England, owing to its insular position, has not for centuries been the scene of war carried on with a foreign enemy. * * * Hence the offence of 'adhering to the king's enemies'—an exceedingly vague expression—has been committed only by a few spies who have in the time of war been detected in giving information to foreign enemies. * * * No questions of legal or constitutional interest have arisen on this branch of the act of Edward III to my knowledge." 2 Stephen 282; Appendix B, p. 111, note 77.

[13] This statement is subject to the qualification that by the 19th century, at least, the charge of treason by levying war seems to have fallen into disuse.

[14] *Cf.* the suggestion of Foster, Appendix B, p. 98, that conduct which in wartime would amount to "adhering" must for the safety of the state be comprehended within "compassing" if no formal state of war had been declared.

In the earlier centuries of the Statute of 25 Edw. III only rare cases are reported in sufficient detail to be helpful, and, indeed, on the treason of adhering to enemies no fully reported case may be found prior to *Lord Preston's Case* in 1691.[15] Even the early commentators concerned themselves primarily with the treason of compassing or imagining the death of the king. The earliest of the commentators on the Statute, such as Staundford, concerned themselves little with acute analysis of the Statute, or with the nature of its restrictive policy, and not at all with the distinct treason of adhering. In Coke, however, there begins to emerge an emphasis upon a restrictive construction of the statute as a protection against abuse of treason charges as a weapon in domestic factionalism. Even Coke's suggestion of the need for a strict construction of the treason of adhering reflects the same concern—a concern that "adhering to enemies" shall not be extended by construction[16] to include adherence to domestic rebels, even those who have flown abroad.

From the time of Coke on this emphasis prevails. It is reflected not only explicitly, in such

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[15] 12 How. St. Tr. 645 (1691). A charge of treason by adhering to enemies was included in the indictment in *Throckmorton's Case*, 1 How. St. Tr. 869 (1554), but it does not appear from the report that the adhering charge was pressed to the jury.

[16] Appendix B, p. 58.

writers as Hale in 18th century England, but also in the preoccupation of English text-writers and judges with the need for a showing that treasonable beliefs and opinions have in some manner and to some extent been put into action.[12] The question of the nature of the statute's restrictive policy thus merges into the question of the nature of the overt act required to support a charge of treason.

Again, the writers before Coke are of little assistance in determining the nature of the required overt act. There may have been at first some doubt as to the need of an overt act in the offense of compassing or imagining the death of the king.[13] Nevertheless, even in the earliest writers the concept begins to appear of an overt act as important not so much as evidence of intent, but as an element of the crime—a step putting in train a course of action tending towards

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[12] Appendix B, pp. 55–59, 73–76, 88–89, 102, 106, 116.

[13] A strict reading of the Statute of Edw. III would support the view that the requirement—"and thereto be proveably attainted of open deed by people of their condition"—applied only to the offenses of levying war and adhering. Coke, however, held that the overt act requirement applied to each of the three main branches of the crime (Appendix B, p. 85), and his view has been so consistently followed that it may now be considered beyond question. By the time of *Vaughn's Case* (1696), L. C. J. Treby could even express a doubt whether the requirement of an allegation of an overt act was not confined to indictments for treason by compassing. See 13 How. St. Tr. 485, 498.

the forbidden result. Unfortunately, even as early as Staundford there is found the ambiguity of analysis and expression which has pursued the crime of treason even down to the present day. His reference to an act as necessary "*a signifier le dit compassement ou imagination*," leaves ambiguous, to just the same extent as the more modern "manifest", whether the act must show the compassing in the sense of itself making clear the treasonable intent, or only in the sense of translating the intent into the world of action by something done towards its execution.[19] And what value his comments might have is further limited by the fact that they are confined to the treason of compassing.

In Appendix B, at pp. 54 *et seq.*, we set forth all that an extensive search has been able to draw from the leading English text-writers as to the function of the overt act in the proof of treason. Of them, generally, it may be said that for the most part their attention was seldom clearly focused on the need for defining the precise function of the overt act. Moreover, their primary concentration on treason by compassing inevitably tends to weaken their value as guides to the construction of a constitutional provision from which that branch of treason is omitted. Nevertheless, the reliance placed upon these writers both during

[19] Appendix B, pp. 65, 76, 92, 103; but cf. 94.

and after the formulation of the Constitution justifies an attempt to state conclusions which we believe are sustained by a fair reading of them as a whole. The principal of these conclusions is that, in spite of continuing ambiguities finding their root in Staundford, the overt act for no one of the branches of treason is required to "manifest" the treasonable intent except in the sense of showing that the treasonable intent, proved by whatever evidence is available, has moved from the stage of thought or belief into that of action. In other words, the overt act is a distinct element of the crime, rather than merely a prescribed means of establishing the intent.[20]

That there are ambiguities of language is clear. Thus, Coke may be cited on either side of the question.[21] The familiar confusion engendered by the use of such words as "a signifier," "manifest," and the like, has already been noted. Similarly, his discussion of the sufficiency of words as an overt act leaves doubt whether his disapproval rests upon their inherent unreliability in the memory of witnesses, or upon their failure ordinarily to reflect a sufficient advance to the stage of action.[22]

Nevertheless, there are substantial indications throughout Coke, Hale, Kelyng, Hawkins, Foster and Blackstone that the overt act was regarded

[20] See, especially, Foster, Appendix B, pp. 93–95.
[21] Appendix B, pp. 65, 69.
[22] Appendix B, pp. 66–68.

as a distinct element of the crime, carrying t
treasonable design into the realm of action, rath
than as a prescribed means of proving the tre
sonable nature of the design. One indication
the negative one—that no commentator has u
equivocally stated so sharp a limitation on t
character of overt acts sufficient to establish tre
son. And such cases as *Crohagan's Case*,[23] and t
text book discussions thereof, strongly indicate tha
the overt act may be "indifferent" in itself, bu
sufficient if linked by evidence to the design as
step in effectuation thereof. Crohagan wa
proved to have said: "I will kill the king if
may come unto him," and thereafter to have com
into England. Of the case, in which the defend
ant was convicted, Hale said:

> yet it is observable, that there was some
> what of an overt-act joined with it, namely
> his coming into *England*, whereby it seems
> to be within the former consideration,
> namely, tho the coming into *England*
> was an act indifferent in itself, as to the
> point of treason; yet it being laid in the
> indictment, that he came to that purpose,
> and that in a great measure expounded to
> be so by his minatory words, the words
> coupled with the act of coming over make
> his coming over to be probably for that
> purpose, and accordingly applicable to that
> end.[24]

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[23] Cro. Car. 232 (1634).

[24] Appendix B, pp. 79–80.

Foster is even more explicit in his treatment of *Crohagan's Case*.

> In this case the words, though laid in the indictment as one of the overt acts, could not be so properly deemed an overt act of treason, as an evidence against the man out of his own mouth, QUO ANIMO *he came into* England. The traiterous intention, proved by his words, converted an action, innocent in itself, into an overt act of treason.[25]

Foster, indeed, is the clearest and most precise of all the English commentators prior to the American Revolution. He is the first clearly to recognize the need for painstaking analysis of the function of the overt act in the crime of treason, and to state the rule without resort to the earlier ambiguous terminology. His statement is not so much a formulation of a new principle, as it is a restatement of old principles inherent in the views of his predecessors but never carefully enough articulated to avert confusion. He is specific; criticizing Kelyng's treatment of *Crohagan's Case*, he says:

> His Lordship reasoneth in this passage as if he considered the overt acts, required by the statute, merely as *matters of evidence*, tending to discover the imaginations of the heart. Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence,

[25] Appendix B, pp. 93–94.

> but as *the means made use of to effectuate the purposes of the heart.*[26]

Again, discussing generally the treason of compassing, he says:

> The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason. It must charge, that the defendant did traitorously *compass and imagine &c.* and then go on and charge the several overt acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and imaginations of the heart: * * *.[27]

Foster's discussion of the sufficiency of spoken or written words as overt acts further illuminates the principle. Earlier writers besides Coke had failed to analyze clearly the basis of objection to resting a charge of treason upon words alone, leaving doubt whether they were regarded as insufficient proof of intent because of unreliability, or insufficient translation of thought into action. Foster clarifies the point, making clear that words which by themselves would be insufficient as overt acts may be made sufficient by proof *aliunde* that they were uttered as means to effectuate a treasonable intent. Thus he says:

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[26] Appendix B, p. 94.

[27] Appendix B, pp. 89–90.

> In the cases cited by *Coke* there were plain flagitious attempts upon the lives of the parties marked out for destruction: and though in the case of the King overt acts of less malignity, and having a more remote tendency to his destruction, are with great propriety, deemed treasonable; yet still they are considered as *means to effectuate*, not barely *as evidence* of the treasonable purpose. Upon this principle words of advice or encouragement, and, above all, consultations for destroying the King, very properly come under the notion of *means made use of* for that purpose. But loose words not relative to facts are, at the worst, no more than bare indications of the malignity of the heart.[28]

And the same principle appears to underly his view that a meeting of several persons, when coupled with evidence that their intention in meeting was to plot treason, is a sufficient overt act.[29]

It may be said that all views quoted or mentioned above have been expressed with relation to the treason of compassing or imagining the death of the King, rather than to the treason of adhering. It is true that, by and large, text book discussions have been directed at compassing, the branch of treason under which, doubtless because prosecutors found it of greater breadth and convenience, the vast majority of

[28] Appendix B, pp. 94–95.
[29] Appendix B, p. 95.

treason indictments were brought. But a fair reading of the treatise writers negates the thought that the doctrines they advanced regarding the independence of the overt act as an element of the crime applied peculiarly to treason by compassing, and not to treason by levying war or adhering to enemies. Again, the negative implication of the materials is persuasive; to the extent that levying war and adhering are discussed, the discussions fail to hint that a different standard would be applied to the sufficiency of overt acts in those areas.[30] Indeed, it was to treason by adhering to enemies that the new overt act requirement of the Statute of 25 Edw.

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[30] It should be noted that from as early as Coke down to the end of the 18th century it was held that at least an assemblage in force was a prerequisite to treason by levying war, and that a conspiracy to levy war would not of itself suffice. Early analyses, however, laid this requirement to the fact that the statute itself "saith levy guerre." See Appendix B, p. 82. Since the creation of treasons by construction and rationalization was not ordinarily inhibited by such mechanical factors, the limitation may well be taken as stemming from the general policy objection to abusing the statute in domestic controversy. So viewed, the limitation takes on the character of a restriction on the field of operation of the statutory prohibition, rather than a qualification as to the type of overt act which would be sufficient once it is established that war has been levied. Marshall's approach in the *Burr* case, treated *infra*, pp. 58–59, is consistent with this analysis. On the other hand, it has been suggested that the limitation stems from the reluctance of feudal lords to surrender their rights in the mutuality of the bond between lord and vassal. 2 Pollock & Maitland 508; 8 Holdsworth 331; Appendix B, II, 2, note 60.

III most unequivocally applied; so that Coke, taking the firm position that notwithstanding the language of the statute overt acts were required for compassing as well as for adhering,[31] resorted to the common law requirement of "some open deed tending to the execution of his intent," as an analogy to support his contention, since the statute "is for the most part Declaratory of the Ancient Law." Neither he nor any subsequent writer suggests any different quality in the overt act required for the two offenses. Foster, again, is the clearest; after reciting that "purposing to go thither to that end [i. e., to a foreign country to incite an invasion] *and taking any steps in order thereto*" is an overt act of treason by compassing, he indicates that for the protection of the state it must be so held because unless the foreign country in question is "actually at war with us" the head of treason by adhering would by its own terms be inapplicable.[32] In Foster's view, it would seem, treason by compassing, at least when involving foreign powers, differs from treason by adhering only in being punishable in the absence of a formal state of war.

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[31] He fails to mention the requirement with respect to levying war, apparently supposing that the actual levying of war, which he held would be necessary, would involve such obvious overt acts of treason as to make discussion unnecessary. See Appendix B, p. 98.

[32] Appendix B, pp. 97–98.

Nor do policy considerations dictate the application of a stricter rule to treason by adhering than to treason by compassing. We have noted (*supra*, p. 20) a reluctance in Coke to see the concept of levying war extended by construction to include domestic controversies. The prevailing doctrine denying the sufficiency of a conspiracy to levy war as an overt act of treason by levying war may stem from the same reluctance (see footnote 30, *supra*). However that may be, we have found no indication that the restrictive policy in the enforcement of the treason statute carries over to treason by adherence to foreign enemies during the existence of a formal state of war. Foster's exposition tends to the contrary:

> The offence of inciting foreigners to invade the kingdom is a treason of signal enormity. In the lowest estimation of things and in all possible events, it is an attempt, on the part of the offender, to render his country the seat of blood and desolation; and yet, unless the powers so incited happen to be actually at war with us at the time of such incitement, the offence will not fall within any branch of the statute of treasons; except that of compassing the King's death: and therefore, since it hath a manifest tendency to endanger the person of the King, it hath, in strict conformity to the statute, and to every principle of substantial political justice, been brought within that species of

treason of compassing the King's death; * * *[22]

And his view is made more specific when he treats incompleted efforts at aid and comfort as being sufficient overt acts for treason by adhering as well as treason by compassing:

> though the money of intelligence should happen to be intercepted: for the party in sending did all he could; the treason was complete *on his part, though it had not the effect he intended.* [citing cases]
> The cases cited * * * did not in truth turn singly upon the rule here laid down, though I think the rule may very well be supported. For *Gregg* was indicted for *compassing the death* of the Queen, and also *for adhering to her* enemies; and *Hensey's* indictment was in the same form, and so was Lord *Preston's* * * *; and the writing and sending the letters of intelligence, which, in the cases of *Gregg* and *Hensey, were stopped at the post-office*, was laid as an overt act of both the species of treason: so that admitting for argument's sake, which is by no means admitted, that it was not an overt act of *adhering*, since the letters never came to the enemy's hands and consequently no *aid or comfort* was actually given, yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt act of the other species of treason. In *Gregg's* case the

[22] Appendix B, p. 98.

judges did resolve, that it was an overt act of both the species of treason charged on him; and in *Hensey's* the court adopted that opinion and cited it with approbation."

That the rule thus stated by Foster is supported by the English cases is conceded by the petitioner in his new brief (Pet. II Br., pp. 10–12). For this reason we do not here burden the Court with an extensive analysis of the cases, although for the Court's information we set forth in Appendix B, at pp. 133 et seq., a short study of the more important cases which have had a function in shaping the law of treason in England. As there indicated, the cases more than the treatises fall short of clear exposition of the relevant principles. Many of the reports, while extensive, are largely consumed by the record of proceedings, testimony, and factual argument. Statements of pertinent legal principle often to be found in the addresses of counsel must be discounted for partisanship; and even the rulings and charges of eminent judges, rendered as they are in the heat and speed of first instance trials in times of great political tension, are entitled to less weight than would be the case with rulings by the same judges on questions of law upon appeal. Our study has led us to the conclusion that the cases are of principal value as precedents when screened by the analysis

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[34] Appendix B, pp. 99–100.

of the treatise writers—many of whom were themselves judges of distinction. And this is the more true in the context of the present case, where the problem is to determine the doctrines which influence American statesmen and jurists in the framing and administration of the American treason provision: for while the influence of English precedents in this country is plain, the evidence is that that influence derived not from first-hand knowledge of the English cases themselves, but from the treatise writers by whom they were analyzed.

Before turning to the developments of American thought on the law of treason, we summarize what we conceive to be the most significant conclusions to be drawn from our study of the English law:

1. The overt act required in proof of treason by adhering to the enemy is, with only specialized exceptions, of the same character and quality as the overt act required in proof of treason by compassing.

2. The overt act is a distinct element of the crime, separate from the element of intent.

3. Both the overt act element and the intent element must be proved by sufficient competent evidence, which need not be, and usually is not, the same in both cases.

4. Assuming establishment of the treasonable intent, the crime of treason is made out when it

is shown that the accused performed an act which is related by adequate evidence to the intent, and which makes the intent operative in action.

5. The fact that the act made the intent operative in action need not appear from the face of the act; the act, taken by itself, and without connecting evidence, may appear to be "indifferent" or harmless.

6. The legal sufficiency of the act of adherence does not depend upon whether it successfully accomplished the intent to give aid and comfort.[38]

B. *Treason in America down to the Constitution*

(1) *The Colonial Period.*—We have mentioned above the persisting influence of the Statute of Edw. III upon the formulation of the American constitutional definition of treason. Primarily, American thought on the subject of treason in the period preceding the Constitution derived from English law, as glossed by English judges and text writers, with local modifications arising naturally out of the tensions and exigencies of the Revolution.[1] Little may be found in the legal and political history of the colonial period in America to cast light on the precise meaning of

[38] Cf. L. C. J. Treby in *Vaughan's Case*, 13 How. St. Tr. 485, 533 (1696), discussing acts of treason by adherence: "And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them."

the constitutional definition. Nevertheless, we have thought it proper in the interests of completeness to search the colonial as well as the Revolutionary and immediately pre-constitutional periods for possible relevant materials. The results of the search made at our request are set out in Appendix B, Part II, I. We summarize them here.

Generally speaking, the early colonial charters and proprietary grants conferred broad authority to deal with offenses against the integrity and stability of government. The terms of these grants were sufficiently comprehensive to include measures designed to cope with what might fairly be thought of as treason, although without limitation to that offense, and without use of the familiar English words of art which might suggest primary concern with that particular offense. Some of the earliest legislative actions taken under these grants, particularly in the northern colonies, were likewise free of traditional language in their definitions of offenses deemed dangerous to the government. However, taking the colonial period as a whole, the evidence is clear that for the most part the definition of the offense of treason was thought of in terms of English legislation, and particularly in terms of the Statute of 25 Edw. III. This was true even in the later legislation of the northern colonies, which had earlier adopted more generalized measures for the pro-

tection of the state. In some colonies, such as Connecticut, Massachusetts and New Hampshire, the observance of English models took the form of substantial copying of the language of the Statute of 25 Edw. III. In others, such as Delaware, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and possibly Virginia, reliance upon English law was reflected by declarations, in varying terms, that the offense of treason should be as defined, proceeded against and punished under the laws of England. Only Georgia and New Jersey failed to adopt at some time treason legislation thus based upon English models. A treason act in Maryland, based upon the language of the Statute of 25 Edw. III, was permitted to expire without reenactment because of a belief that the criminal laws of England extended by their own force to the province.

The legislation of the colonies thus reflects thorough awareness of the English law of treason—an awareness not infrequently heightened by action of the government in England invalidating some colonial statute as inconsistent with, or unnecessary by virtue of, the Statute of 25 Edw. III. The extent of detailed knowledge of the application of English treason law in particular situations is, however, open to more question. Reported treason cases are rare. Only one case prior to the Revolution is preserved in sufficient detail to be of value—*King* v. *Bayard*, 14 How. St. Tr. 471 (1702). The record in this case shows famili-

arity on the part of counsel with English law as analyzed and construed by Coke, and a readiness to apply the analogy of that law even under a New York statute which in its terms bore little resemblance to familiar English precedents. Neither from this case, nor from any other case materials, is it possible to deduce the growth in pre-revolutionary days of any indigenious American common law of treason.

The definition of treason in the Constitution of the United States is restrictive, in that it confines to two the offenses which may be dealt with as treason, without leaving even to the legislature the freedom preserved by the Statute of 25 Edw. III to add to the definition. The colonial period, however, reflects no premonition of this restrictive policy. The legislative emphasis is almost wholly upon protection of the safety of the state—a concern natural enough in any developing and remote territory always subject to grave danger from external enemies. Whatever the cause, there is no evidence prior to the Revolution of a mistrust of the broad constructions accorded to the treason statute under English law. Many of the colonies specifically carried over the crime of compassing or imagining the death of the king; Maryland and Pennsylvania went even further, in extending the crime to cover compassing or imagining the death of the proprietor—a course which in the case of Pennsylvania incurred the displeasure of the English authorities as presumptuous. As

had been the case in England, times of peculiar stress, such as the French and Indian wars, or domestic upheavels either in America or England, produced additional legislation either expanding the definition of treason or punishing new offenses with comparable severity.[20] Many of the colonies provided specifically by statute against those forms of domestic insurrection which had been brought by English judges within the scope of treason by "constructive levying of war."[21] In some cases conspiracy to levy war, which in England had early been excluded from the treason of "levying war" (although it was later brought within treason by compassing), was specifically included. The evidence will not sustain the thought that such enactments as these reflected any self-conscious intent to import in detail the extensive gloss which had

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[20] Most of this legislation antedated 1700, however, cf. charges to the Grand Jury in 1765 and 1766 by the Chief Justice of the Province of Massachusetts Bay: "Levying War against the King is High Treason: as where People set about redressing public Wrongs: this, Gentlemen, the Law calls levying War against the King; because it is going in direct Opposition to the King's Authority, who is the Redresser of all Wrongs." Op. cit. Appendix B, II, 1, note 21.

[21] Some of this special legislation, described in detail in Appendix B, II, 1, is of particular interest because of the types of conduct, in the nature of adhering to the enemy, which it proscribes, and also because of the creation of exemptions based upon the absence of treasonable purpose. The exemptions tend to support at least a tenuous inference that the overt act was regarded as a separate element of the crime, distinct from the intent element.

been placed upon the law of treason in England; but it is likewise inconsistent with any suggestion of mistrust of English treason law in the colonial days. As reflected in Delaware and Pennsylvania statutes, the English law of treason was regarded as within the "birthright of English subjects."

If the colonial legislation thus shows an almost unbroken tendency to put the interest in community security first in defining the types of conduct which shall be deemed treasonable, it is equally true, however, that it displays a consistent regard for the types of procedural safeguards which had grown up under English law. Certain early statutes required at least two witnesses to prove any capital offense. From the latter part of the 17th century on, in most of the colonies the two-witness requirement and the procedural guarantees laid down by the Statute of 7 William III in treason trials were expressly enacted by reference to that statute or to the English statutes on treason generally.[38] The witness requirement of course meant simply a requirement of two witnesses without the specification laid down subsequently in the United States Constitution, that they be to the same overt act. On the other hand, pursuant to the Statute of William III, they must be witnesses to the same treasonable offense, and one witness

[38] See Appendix B, II, 1, note 26.

to each of two separate treasons, or at least two different types of treason, would not suffice.

The foregoing summary will show that, from our point of view, the legal and political history of the colonial period in America is of relatively little assistance except in the aspect of showing the attitude in the colonies towards English models, and the prevailing reliance thereon. We have found no recorded cases which would throw light on the nature of the overt act required in treason by adhering to enemies. Moreover, there is little in colonial history in the way of abuses of treason legislation which might foreshadow or explain the extent of the limiting intention of the framers of the constitutional definition. If, as the petitioner argues (Pet. II Br., p. 39), "the constitutional definition created an entirely new pattern", neither the shape of that new pattern, nor the reasons for its adoption, can be found in the colonial period.

(2) *The Revolution.*—It is in the revolutionary period that we encounter the first hint of departure from the English law of treason. As that period created new enemies to fear, and new allegiances to support, so also it furnished political reasons for opposing broad constructions of the English law adopted to cope with the rebelling colonists. As early as 1774 Jefferson had protested the proclamation of General Gage in Massachusetts declaring it treason for the inhabitants to assemble or to form associations for the

purpose of considering grievances. His protest took the following form:

> If he considers himself as acting in the character of his Majesty's representative, we would remind him that the statute 25th, Edward the Third has expressed and defined all treasonable offences, and that the legislature of Great Britain had declared, that no offence shall be construed to be treason, but such as is pointed out by that statute, and that this was done to take out of the hands of tyrannical Kings, and of weak and wicked Ministers, that deadly weapon, which constructive treason had furnished them with, and which had drawn the blood of the best and honestest men in the kingdom. * * *[39]

The objection ran to other matters than the substance of the crime; for example, both the Declaration of Independence and the earlier Resolutions of the Continental Congress (1774)[40] reflect apprehension of the growing threat of transporting colonists to England for trial for treason and other offenses.

The first articulate thinking on the need for a restrictive construction of the law of treason thus comes from Jefferson, or at least from materials in which he had a hand. He was a member of the Committee on Spies which recommended to the Continental Congress that the several colonies

[39] Appendix B, II, 1, note 26.
[40] Appendix B, II, 1, note 37.

adopt uniform treason legislation framed in the familiar terms of the Statute of Edw. III, but with omission of the treason of compassing. The omission may well have arisen from the simple fact that the colonists no longer recognized a king whose death could be compassed or imagined; or it may have stemmed at least in part from a more self-conscious desire to eliminate abuses the dangers of which were naturally becoming increasingly perceptible to men who by their own conduct were opposing an established government. Whether or not the form of the recommendation was shaped by any such self-conscious intention, the thought was clearly in Jefferson's mind. His protest to General Gage had already reflected his concern with treasons imposed at the hands "of tyrannical Kings, and of weak and wicked Ministers"; a similar concern with the constructive extension of treason by judges—foreshadowing the ultimate constitutional provision—appears in his notes to his draft of a proposed Virginia treason statute which he transmitted to Chancellor Wythe in 1778. See Appendix B, II, 1, note 41. A similar precautionary note appears in the arguments of James Wilson as defense counsel in the Pennsylvania treason trials.[a] His ar-

[a] These trials were under the Pennsylvania statute of 1777 quoted by the petitioner in his second brief (Pet. II Br., pp. 25-27). They are of particular interest in that, like the earlier case of *King* v. *Bayard* (*supra*, p. 36), they illustrate the tendency of American lawyers to rely upon English treason precedents even in trials under a statute

ments, as scantily recorded by the chief justice at the trials, reflect a new appreciation, not apparent in colonial days, of the Statute of Edw. III as a restriction on the powers of government and a protection of the rights of the individual. His views, like those of Jefferson, deserve weight because of his participation in the formation of the outlines of the new government.

However, the restrictive point of view advanced by Jefferson found little reflection in legislation by the states prior to 1790. True, following the recommendation of the Continental Congress, most of them adopted treason statutes which omitted treason by compassing; but their continued dependence on English models in other respects is clear. Several of the state statutes of the revolutionary period provided specifically or by implication for construction by the standards applied under the Statute of Edw. III; none of them followed the restrictive approach recommended by Jefferson in 1778. And, as in periods of particular stress in colonial times (see p. 38, *supra*), special statutes abounded which itemized particular types of conduct, in the nature of adhering to the enemy, which were deemed treasonable or at least worthy of comparable punishment. Though the crime of treason by compassing was gone, almost half the states revived the old crime

bearing very little resemblance to the Statute of Edward III. The cases are the first in America containing any particular discussion of the significance of the overt act element in the crime. See Appendix B, II, 1, note 35.

of conspiracy to levy war—in England comprehended only within treason by compassing; other statutes added what in effect were offenses of conspiring to adhere to the enemy, giving him aid and comfort.[42] Under many of the statutes it was arguable, and in others clear, that the offense lay in engaging in particular proscribed conduct, regardless of specific treasonable intent. Over all, the safety of the state was paramount, with little preoccupation with the protection of individual rights. Such procedural safeguards as appeared followed familiar models, such as the Statute of 7 William III, with no premonitory hint of the type of two-witness requirement later inserted in the Constitution.

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[42] See Appendix B, II, 1, notes 47–76. The Pennsylvania statute referred to in the preceding footnote affords an example; among other things it declared guilty of high treason anyone who should "form, or be anywise concerned in forming any combination, plot or conspiracy for betraying this state or the United States of America into the hands or power of any foreign enemy." The petitioner, much relying on this statute, chooses to treat its itemization of treasonable conduct as representing types of actions which would be clearly sufficient as overt acts under the constitutional definition (7 Pet. II Br., p. 27); from which it would appear to follow that a conspiracy to adhere to the enemy was regarded as constituting treason by adherence. It should be noted, however, that the Pennsylvania statute, while paralleled in Connecticut, North Carolina, and Vermont, was of a minority type, not representative of treason legislation in the revolutionary period as a whole. See Appendix B, II, 1, note 62.

(3) *The Adoption of the Constitution.*—Revolutionary as well as colonial experience thus offers little to explain the precise scope of the substantive restriction imposed upon treason by the constitutional definition. There is no indication that grievances over oppressive prosecutions for treason or any other offense were among the causes which brought the Federal Convention together in 1787. Nor do the first stirrings of the new Constitution disclose any leaning toward restriction. In 1786 a committee of the Continental Congress, reporting proposals for amendments to strengthen the Articles of Confederation, included among them a suggestion that Congress should have the sole and exclusive power to define and punish treason, without hint of limitation upon the federal legislative power. A similar proposal found its way into the "Pinckney plan" for the new government which was presented to the Convention at its opening. Hamilton's proposed plan of government provided merely, as to treason, a limitation on the pardoning power.[7]

The actual process of formulation of the final constitutional definition, so far as that process can now be reconstructed, is hardly more revealing. In our first brief, we described the debate in the Committee of the Whole in so far as it

[7] Appendix B, II, 1, notes 77–81.

related to the two-witness requirement (I Br., pp. 37–38). The study in Appendix B, II, 1, (c), outlines in greater detail the process by which the final treason clause was produced.

The nucleus of the ultimate treason definition came from the Convention's Committee of Detail. This committee had set to work under a general instruction to devise means enabling the national legislature "to legislate in all cases to which the separate States are incompetent", but with no specified authority to deal with the subject of treason. It presumably had before it the various proposals already mentioned, none of which reflected any fear of the exercise of national power in the field. It may also have had before it the suggestion contained in a draft of the "New Jersey Resolutions", advanced on behalf of the small states, that the Constitution should define what offenses committed in the states should be deemed treason against the United States. Though this suggestion did not remain in the "New Jersey Resolutions" in their final form, the materiality of its implications is reflected in the lengthy discussion in the Convention of the relative boundaries of federal and state definitions of treason. It is at least consistent with the evidence to suppose that the first and paramount pressure for limitation of the definition of treason in the federal Constitution arose from a growing fear that the strengthened federal government might seek to dominate the separate states through

abuse of treason prosecutions in what were essentially domestic political controversies. The states themselves, since their dissociation from England, had freely preserved and developed English models for coping with treasonable activities, and, as we have seen, their political and legislative history reflected no qualms at the use of treason statutes to preserve governmental stability. They had shown themselves ready to re-establish legislatively aspects of treason which had by dialectical reasoning of the English judges and commentators been brought within treason by compassing or imagining the death of the king; and this readiness in itself argues strongly that their general abandonment of that broad category of treason had been significant more of the absence of a king than of any particularly restrictive policy in the definition of the offense. The fair implication of history is that the substantive restriction of the constitutional provision was designed to limit the federal government as such to control over those areas of treason which involved actual rebellion in force or attack by foreign enemies of the United States, without qualification as to the types of conduct which by previous, including English, historical standards had been regarded as treasonable in these areas.

The actual history of the treason clause in the Convention is consistent with this conclusion. As

it emerged in the draft Constitution reported by the Committee of Detail, it read as follows:

> Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted.

This was the draft which fixed the main outlines of the final provision. It will be seen that with respect to the substantive definition of the offense it followed the familiar model of the Statute of Edward III, varying therefrom primarily in omitting the crime of treason by compassing, as had already been done in the legislation of most of the states. As the evidence fails to suggest that the states by their earlier similar action had sought in any way to restrict the crimes of treason by levying war and by adhering to enemies, a constitutional definition following the state precedents is likewise without implication as to restrictive intent. Procedurally also, the draft accepts standards already tested by experience; a two-witness requirement, unrelated to any particular overt act, had been a commonplace

in colonial and revolutionary legislation. The one truly novel contribution of the draft lies not in these matters, but in the restriction, without precedent either in England or America, upon the power of the federal legislature to expand the definition. The draft impels the implication that in so far as it sought restriction it was designed, not to narrow existing concepts of treason by levying war and adhering to enemies, but to confine the federal legislature to those existing concepts."

The debates in the Convention, except in the respect that their preoccupation with the relative boundaries of federal and state power over treason tends to support this thesis, cast little further light on the question. The underlying assumption of at least many of the members that English precedents in the construction of treason would continue to govern under the Constitution is indicated by the controversy whether to restore the "aid and comfort" phrase of the Statute of Edward III. The circumstances of the restoration of the phrase leave some doubt whether the desire was to restrict or to expand the definition; the fairest inference seems to be that its restoration was regarded as placing the constitutional provision on familiar ground. At least the final motion, upon which the phrase was restored, embodied the view that without

[1] Appendix B, II, 1, note 84.

the phrase; the constitutional definition would be broader than the Statute of Edward III.[45]

It is not entirely surprising that the treason provision, which had occupied relatively little of the time in the Convention, acquired more importance in the debates over ratification of the Constitution by the states. Its prominence in these debates was given to it largely by proponents of the new Constitution, who in a sense regarded themselves as responsible for extolling the new form of government to states highly jealous of their own sovereignty, and fearful of encroachment thereon by a super-government. In such an atmosphere, an article thought of as primarily significant for its limitations upon the power of the federal government became a highly valuable weapon of debate. It is true that James Wilson, who through his participation in the Pennsylvania treason trials if for no other reason had become deeply concerned with the subject of treason, laid much emphasis upon the generally restrictive nature of the definition; but throughout even his praise of the new provision the dominant note is its effectiveness to prevent the federal legislature from misuse of treason charges as a weapon in domestic political strife. The evidence is perhaps not all on one side. Jefferson's unshackled mind had without doubt envisaged a new state in which the rights of the

[45] Appendix B, II: 1, note 86.

citizen should be paramount—although it was suggested that by the time of Burr's acquittal his earlier views had been somewhat modified (see Appendix B, II, 1, note 115). Wilson doubtless looked for a careful restriction of definition of treason in the newly constituted nation. But Wilson's own thoroughgoing familiarity with the British as well as the American precedents argues that, had he contemplated a restriction upon those forms of treason which had traditionally been held to fall within levying war and adhering to enemies under the Statute of Edward III, he would have protested a constitutional provision following the terms of that statute, and would have fought for new and more plainly restrictive language. To Wilson too, it would seem, the merit of the new constitutional provision was not that, in the petitioner's phrase, it "created an entirely new pattern," but that it permanently and definitely confined the federal government to old patterns, whose contours had been fixed over the centuries by a process of interpretation.[46]

The conclusion which we draw from the background of the American constitutional definition of the crime of treason is thus that as to the substance of the offense and the elements required for its establishment the Constitution created no such "entirely new pattern" as the petitioner suggests.

[46] Appendix B, II, 1, notes 90–94.

This is not to deny the existence of a deep-felt fear of abuse of treason, especially by the creation of new "constructive" treasons under the charge of treason by levying war. This fear is clearly implied by the overtones of debate. But the direction and the limits of the fear are well indicated by Madison's comment in *The Federalist*, that "newfangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other." [47] A concern so expressed, in terms themselves drawn in part from Blackstone,[48] hardly points to an intent to reject centuries of English and American experience with those established forms of treason which deal basically with the protection of the state against actual rebellion in force or attack by external enemies. We believe that the record as a whole emphatically negatives any such view.

Thus far, we have discussed the substance of the offense of treason. Procedurally, there is no doubt that the Constitution introduced a pure novelty—the extension of the two-witness requirement to cover each overt act. The specific requirement that conviction rest upon "the Testimony of the two Witnesses to the same overt Act" finds no substantial historical precedent

[47] Appendix B, II, 1, note 95.

[48] Blackstone likewise referred to "newfangled" treasons; see Appendix B, p. 102.

The constitutional materials surrounding its origin are sparse. A general two-witness requirement was familiar; but the linking of this requirement to a single overt act is foreshadowed in none of the earlier recommendations, nor in the draft constitution reported by the Committee of Detail. All that is known appears in the debate of the Committee of the Whole, from which in our first brief we quoted the pertinent passages (I Br., pp. 37–38).

Sometimes the obvious answer to a question of historical research is to be mistrusted merely because it is obvious; but here we believe that the obvious answer is the right one. The change in the two-witness requirement was laid by Dr. Franklin to the need for protection of the innocent against perjury, in view of the notorious fact that "prosecutions for treason were generally virulent." Overt acts of treason had theretofore generally been provable by the testimony of a single witness; where two witnesses had been required each alone might prove a separate act. Under the amendment, what before could be shown by one witness now required two. This is all that we can draw from the fact and circumstances of the amendment, and we believe it fully sufficient to justify the amendment in terms of purpose. Certainly the historical materials furnish too tenuous a thread to sustain the view that the amendment

somehow worked a change in the traditional function of the overt act element in treason.

C. *Treason in America under the Constitution*[49]

If there were doubt from the materials of the constitutional period as to whether the constitutional definition was designed to create "an entirely new pattern" of interpretation, divorced from historical English precedents, that doubt is resolved in the negative by an examination of the American treason cases following 1790. The cases, it is true, are relatively few.[50] But through them runs a strong and consistent thread of dependence upon the law of treason as developed in England under the Statute of 25 Edw. III. With but occasional and inconclusive deviations,[51] American treason opinions have whole-heartedly acknowledged the historical continuity of the crime, and have sought, if not binding authority, at least helpful guidance from the English precedents and even more from the expositions of English commen-

[49] See, generally, Appendix B, II, 2.

[50] In Appendix B, II, 2, note 21, there are collected the citations and brief descriptions of all reported cases disclosed by a diligent search. Disregarding grand jury charges and cases with only incidental involvement of treason, the total number of instances in which the construction of the federal constitutional provision was in issue is but 35; in addition, there have been two reported trials for treason against states, those of Thomas Wilson Dorr (R. I., 1844) and John Brown (Va., 1859).

[51] See Appendix B, II, 2, note 20.

tators.[52] Treason under our federal Constitution is a direct descendant of treason in England.

This is not to suggest that American treason decisions have been controlled by blind adherence to the English materials. Though the initial omission of treason by "compassing" from the stand-

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[52] See cases cited in Appendix B, II, 2, note 21, especially Chief Justice Marshall in *United States* v. *Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 159–160:

"* * * It is scarcely conceivable that the term [levying war] was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them, in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edw. III, from which it was borrowed. It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect."

ard statutory definitions of the revolutionary period and from the Constitution itself does not appear to have sprung from any clear or self-conscious intention to limit the scope of the offense except to the extent that the omission itself indicates,[53] yet the fact of the omission has exerted a strong influence on judges called upon to construe the clauses remaining in the federal provision. For it was in relation to treason by "compassing" that the greatest extravagances had been committed in England; and the omission of the clause, whatever might have been the original purpose in omitting it, served to suggest the need for a cautious and conservative approach to the English authorities. Rejection of them as a whole was, as we have noted, rare; but reservation was not uncommon. Typically, Mr. Justice Iredell found occasion to comment upon the need for careful selection of the "better and more modern decisions", which might be assumed to be the guides which the framers of the Constitution had in mind.[54] Similar reservations may be found in expressions by Marshall, Peters, Chase, and Grier.[55]

The restrictive approach to treason indicated by this early attitude towards the English au-

[53] See pp. 46–49, *supra*; cf., however, Appendix B, II, 1, (c), reflecting an evaluation of the evidence with which we do not agree.

[54] Charge to the jury in the first *Fries* trial; Appendix B, II, 2, Note 25.

[55] Jury charges in the *Burr*, *Fries*, and *Hanway* trials; Appendix B, II, 2, notes 22–26.

thorities has been a marked characteristic of the law of treason in America under the Constitution. We have noted in the preceding section of this brief our belief that the constitutional definition itself grew primarily out of a desire to confine the federal government to established standards, and to enlarge the protection against perjury; but with respect to the substantive aspects of the crime any doubt as to the existence of a restrictive policy of interpretation following the Constitution cannot survive a fair reading of the cases. The cases have reflected not only a policy of avoiding the excesses of English treason law, but a preoccupation with the need for guarantees designed to ensure maximum protection against prosecution for merely unpopular beliefs or for conduct falling short of an actual attempt to give effect to a betrayal of allegiance. The atmospheric condition reflected by the Bill of Rights favored the growth of a body of doctrine opposed to the creation of new treasons by "constructive" levying of war, in the absence of a clear showing of specific intent to subvert the government by force; and though the aim has not always been achieved, the decisions show an earnest effort at precise definition of the offense, in the interest of protecting individual freedom of thought, and averting treason prosecutions merely for the satisfaction of popular hysteria. The restrictive approach thus reflected accords with the spirit of

our Constitution, whether or not required by its terms.

But if it is important to observe the existence of a restrictive policy in interpretation, it is equally—and for purposes of this case more—important to observe the limitations of that restrictive policy. It is a significant fact that the bulk of treason prosecutions have been brought under the head of levying war, and that the restrictive approach has found primary expression with respect to the character of conduct which would constitute that crime. From the Whiskey Rebellion cases in 1795 [8] down to the Civil War the deepest concern of the courts was to ascertain the precise limits of "constructive levying of war", and to state principles which would confine the charge to uprisings in force convened with a deliberate and specific intention to defeat the operations of government with respect to something more than a particular or private object. The confining principles took varying forms. In the *Bollman* [9] case, for instance, Chief Justice Marshall took occasion to reiterate the long established English doctrine that conspiracy to levy war is not treason by levying war—for the reason that war has not been levied. His practical direc-

[8] *United States* v. *Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 37 (Circ. Ct. D. Pa.); *United States* v. *Mitchell*, Fed. Cas. No. 15,788, 26 Fed. Cas. 1277 (Circ. Ct. D. Pa.)

[9] *Ex parte Bollman*, 4 Cranch 75, 126.

tion of a verdict at *Burr's* trial [58] rests upon a comparable principle: though even remote or minute actions by a defendant in aid of a war actually levied by an assemblage in force may be laid against him as overt acts of treason, yet if he was not present at the assemblage and took no part in it, the assemblage itself cannot by "construction" be laid against him as an overt act on his part, however strong the showing of his treasonable intent. By contrast, in numerous cases involving plainly sufficient overt acts of levying war, in the sense of accomplished violent resistance to authority, the decisive factor in favor of the accused has been the inadequacy of any showing of a specific intent directed to the necessary public or general purpose.[59] The latter group of cases reflects essentially an endeavor to distinguish between the offense of treason and the reprehensible but less grave offense of riot; and by the middle of the nineteenth century the line seems to have been drawn with sufficient clarity to preclude further attempts to deal with riots by means of treason prosecutions. The only reported attempt since the Civil War to use the charge of treason by levying war was an abortive indictment under Pennsyl-

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[58] *United States* v. *Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55 (Circ. Ct. D. Va.).

[59] *E. g., United States* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 400, 402 (Circ. Ct. D. Vt.); *United States* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 127 (Circ. Ct. E. D. Pa.).

vania law arising out of the Homestead Riot of 1892.[40]

From the cases on treason by levying war we may thus draw a lesson in careful definition of the crime, so as to exclude mere conspiracies or riots. But we find nothing in them to suggest abandonment of the basic distinction of English treason law between the intent and the overt act as separate elements in the crime, each subject to proof which might, but more generally would not, be the same. The overt act must, it is true, advance the intent so far in execution that it can be said that war is being actually levied, and much of the apparently restrictive language of the cases may be explained by the preoccupation with the necessity of establishing this prerequisite fact; but this is very far from saying that the nature of the overt act must be such as to show on its face that the assemblage is with treasonable intent. The contrary inescapably appears from Marshall's statement in the *Bollman* case (4 Cranch 75, 126), reiterated by him (although not regarded as there controlling) in his charge to the jury in the *Burr* case (25 Fed. Cas. 55, 161), that "if war be actually levied, that is, if a body of men

[40] See Appendix B, II, 2, notes 27, 110–112.

"* * * some actual force or violence must be used in pursuance of such design to levy war; but * * * it is altogether immaterial whether the force used is sufficient to effectuate the object—any force connected with the intention will constitute the crime of levying war." *Case of Fries*, Fed. Cas. No. 5127, 9 Fed. Cas. 924, 931.

be actually assembled, for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minor, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors".

When we come to the cases of treason by adhering to enemies, the story is the same. These cases are fewer in number; prior to 1919, only three such reported cases have been found, all arising out of the War of 1812.[62] The *Lee* case, for instance, brief as is its report, reiterates Marshall's view expressed in the *Burr* trial[63] that evidence of intent may at the election of the prosecution be presented prior to any proof of the overt act charged—a view inconsistent with an understanding that evidence of intent serves merely to corroborate an intent required to appear from the overt act itself. And in *United States* v. *Pryor* the primary concern of Mr. Justice Washington's charge to the jury was whether the separate evi-

[62] *United States* v. *Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C.); *United States* v. *Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md.); *United States* v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa.). A charge of treason by adhering to enemies was included in the indictment in *United States* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct., N. D. Cal.), but was withdrawn from consideration of the jury on the ground that adherence to rebels did not constitute adherence to "enemies" within the meaning of the Constitution.

[63] Fed. Cas. No. 14,692b, 25 Fed. Cas. 52, 53–54.

dence of intent was sufficient to establish the treasonable nature of an act which on its face might have been either treasonable or non-treasonable. Moreover, *United States* v. *Pryor* sustains the view of Foster and the English cases (see pp. 31–32, *supra*) that success in accomplishment of a design to give aid and comfort to the enemy is no prerequisite of the crime. Mr. Justice Washington, it is true, distinguished as non-treasonable the act of going in search of provisions to supply the enemy and "stopping short before any thing was effected, and whilst all rested in intention" (27 Fed. Cas. 630). In such a case the design to give aid and comfort to the enemy has been abandoned before being sufficiently translated into the realm of action to satisfy the requirement of an overt act. But "carrying provisions towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different" (*ibid.*). Success is unnecessary.

With the exception of Judge Learned Hand's opinion in *United States* v. *Robinson*, 259 Fed. 685 (S. D. N. Y.), the modern reported cases on treason by adhering to the enemy likewise make clear that the sufficiency of the overt act depends neither upon successful giving of aid and comfort nor upon superficial "manifestation" of treasonable intent. These principles are inherent in the jury charges in the *Fricke*, *Werner*, *Haupt*, and

Stephan cases.[64] Judge Mayer's statement in the *Fricke* case is perhaps the most concise:

> An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime. (259 Fed. 673, at 677).

But the same views have been expressed with equal directness in each of the other cases in which the problem has arisen. The decisions are marked by an almost surprising lack of judicial questioning, and unanimity of conclusion.

Judge Hand's opinion in the *Robinson* case is puzzling. It recognizes, with disapproval, that under *Lord Preston's Case* "aid and comfort need not reach the enemy," and that this "has since remained the law." (259 Fed. 685, at 690). Possibly, as suggested in the Appendix,[65] his dislike of what he regarded as an unfortunate but undoubted turn in the law led him to attempt a compensatory rationalization of the overt act as something that must show the treasonable intent

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[64] *United States* v. *Fricke*, 259 Fed. 673 (S. D. N. Y.); *United States* v. *Werner*, 247 Fed. 708 (E. D. Pa.); *United States* v. *Haupt*, 47 F. Supp. 836, 839 (N. D. Ill.), reversed without criticism of this portion of the charge, 136 F. (2d) 661 (C. C. A. 7); *United States* v. *Stephan*, 50 F. Supp. 738, 742–743, note, affirmed 133 F. (2d) 87, 99 (C. C. A. 6). The unreported opinion of Judge Clancy in *United States* v. *Leiner* (S. D. N. Y. 1943; printed as Appendix I to petitioner's first brief herein) alone follows Judge Hand's view as to the need for "manifestation" of treason by the overt act.

[65] Appendix B, II, 2, pp. ——.

on its face. Whatever the reason, his rationalization lacks support either in history or in contemporary judicial thought.

We draw from the cases, then, American as well as English, the conclusion that the function of the overt act in treason by adhering to the enemy—as in the other branches of treason—is to show that the accused has moved from the realm of thought or opinion into that of action—that he has done something about what he has in his mind. This act need not accomplish his objective; it need not "manifest" or "demonstrate" on its face his treasonable design; but it must, when related by adequate evidence to a treasonable intention, be sufficient to establish that the treason no longer rests merely in intention, but has in some way been put into execution.

So viewed, the overt act is a proper subject for the safeguard of the two-witness requirement. Overt acts are not just any incidental actions which may happen to occur concomitantly with the existence of the treasonable scheme, or during its execution. They are those parts of the scheme which constitute action in its furtherance, either effecting or attempting[66] the purpose to give aid and comfort to the enemy. We do not

[66] As shown by the discussion in Appendix B, II, 2, notes 61, there is much authority for the view that treason is essentially in the nature of an attempt. Indeed, it has been suggested that attempts in criminal law are historical outgrowths of the law of treason. *Id.*, note 61.

suggest, in the petitioner's analogy (Pet. II Br., p. 3), that a charge of treason by giving to the enemy secret information could be established by laying and proving as overt acts merely that while planning or preparing to give the information the defendant arose, ate breakfast, or tied his shoelace. Nor does Judge Mayer, when he says that the act "in itself may be a perfectly innocent act," mean that any such incidental acts as the petitioner suggests may be laid as overt acts of treason. Such acts would be insignificant in the treasonable scheme—inadequately related to it in terms of purpose or effectuation. What Judge Mayer means, what Foster means by reference to "an action, innocent in itself" (supra, p. 25), and what we mean, is that an act laid as an overt act of treason may be sufficient even though, when taken alone and isolated from all other evidence, it may fail to disclose to the observer that a treasonable purpose is being effected or attempted. But though it need not, in isolation, "manifest" the treason in the petitioner's sense, it must be such an act as, when viewed in the light of all the circumstances and itself proved by two witnesses, will establish that the scheme of giving aid and comfort to the enemy has been placed into execution—that action is being taken to give aid and comfort to the enemy—that allegiance is being betrayed.

The overt act, as so regarded, is an important and significant element in the proof of treason, whatever may be its superficial aspects. As the objective phase of the crime, perrequisite as a protection against punishing men merely for their thoughts or intentions, it clearly justifies the belief of the framers of the Constitution that to require two witnesses for proof of each overt act, as against the one theretofore needed, would provide a substantial safeguard against convictions by perjured testimony. There is no need to assume, as did Judge Hand, that the two-witness requirement would be meaningful only if the overt act must manifest the intent on its face, without need for corroborating evidence;[67] Wigmore, more cogently and with less deviation from history, fully justifies the requirement by pointing out that "the opportunity of detecting the falsity of the testimony, by sequestering the two witnesses . . . and exposing their variance in details, is wholly

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[67] *United States* v. *Robinson*, 259 Fed. 685, 691–2. Judge Hand also suggested that "the requirement of two witnesses probably had its rise from the canon law," and that "wherever it comes from, [it] implies a system of trial not rational in its processes at all." Although we find no evidence whatsoever that the framers of the two-witness requirement—in either its English or American form—were guided by anything but rational and contemporary realism, we have for the information of the Court included in Appendix A a short opinion on the nature of the two-witness requirement in canon law, prepared at our request by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, and Honorary Consultant in Canon Law, Library of Congress.

destroyed by permitting them to speak to different acts".[*] Furthermore, it is clearly enough established that the intent need not be proved by two witnesses; Mr. Justice Iredell and Judge Peters expressly so charged the jury at the first trial of *Fries*, Fed. Cas. No. 5126, 9 Fed. Cas. 826. Mr. Justice Iredell said, at p. 913:

> It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act, but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is conclusive.

And Judge Peters, at p. 909, charged the jury that:

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[*] See Appendix B, II, 2, note 77. Cf. Dr. Kuttner's statement, Appendix A, p. 41, of the canonical view: "there will rarely be two perjured witnesses in whose testimony a prudent judge would not find flaws and contradictions (the case of Susanna, *Dan.* xiii, is always cited as classical example), while the full convergence of the observations made by two persons has the almost irrefutable presumption of truth in its favor."

> Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact.

This distinction between the evidence required to prove the act and that required to prove the intent would be obliterated by a rule demanding that the testimony of the two witnesses to the act also establish the intent.

Nevertheless, it may still be asked what grounds of policy can support a construction under which lesser or different proof suffices to establish the vital treasonable intent than to establish an overt act which, at least to the two witnesses proving its commission, may appear totally innocuous on its face. One answer lies in the inherently different qualities of the two elements to be proved. Acts, in their nature, are susceptible of being perceived and proved. They are objective occurrences, establishable by observation and report, and none the less so because in particular instances the probative value of the testimony of the witnesses may vary with the keenness of their senses, the accuracy of their recollections, or the integrity of their purposes. But though witnesses can testify directly to what they saw a man do, they cannot testify directly to what he believed or intended. Intent, while equally a legal fact, is essentially a subjective element, deducible as a fact only by inference from observed actions. In its nature it cannot

be directly proved, but must be gathered as a matter of reasonable probability from acts which can be directly proved. Even the strongest inference of intent from unimpeachably proven acts may be upset by explanation, as when one marching in the uniform of the enemy—the observed act—is shown to be a spy for his own country. Intent is not the kind of legal fact to which a requirement of cumulative proof by direct witnesses can have any rational application.

Moreover, though the proof sufficient to establish the intent may be different in quality from that required to establish the overt act, it does not follow that any less convincing proof is or should be required.

The intent must be a specific intent, directed proximately at the betrayal of allegiance by levying war or by adhering to enemies, and established beyond a reasonable doubt. This insistence is most marked in the cases dealing with treason by levying war; mere casual or unpremeditated participation in riots, or spontaneous resistance to particular acts of governmental authority, has been excluded from the area of treason, not for lack of a sufficient overt act, but for lack of sufficient evidence of a specific intent to subvert the government.[69] The same note ap-

[69] See, for example, *United States* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 400, 402. (Circ. Ct. D. Vt.); and *United States* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 127. (Circ. Ct. E. D. Pa.).

peals in the adhering cases; although the addition of a non-culpable motive, such as personal friendship for individual enemies, will not of itself preclude guilt, yet the opinions have carefully defined the requirement of a specific intent to aid the enemy as such.[30] Showing of such an intent is, and should remain, an imperative necessity.

Treason is the gravest of all crimes. By its nature it can only be charged or suspected in times of tension, when heightened public passions tend to raise merely unpopular beliefs or desires to the stature of unpatriotic conduct, and enlarge the danger of unjust or unfounded accusations of disloyalty. Our Constitution protects freedom of speech and belief, freedom to advocate unpopular notions or courses of action, as much in time of war or civil dissension as in time of peace and quiet; and in recognition of these guarantees the courts under the Constitution have done great

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[30] See *e. g.* Judge Mayer's charge in *United States* v. *Fricke*, 259 Fed. 673, 676:

"If not satisfied beyond a reasonable doubt that the defendant's intention and purpose in acting as he did was evil—that is, if not satisfied beyond a reasonable doubt that he intended to aid and comfort the enemies of the United States—and if not satisfied that that was his object, the defendant must be found not guilty."

Cf. United States v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 630; *United States* v. *Stephan*, 30 F. Supp. at 744, note, charge approved, 133 F. (2d) 87, 89 (C. C. A. 6). As we pointed out in our first brief, pp. 54–55, note 30, the same caution was exercised in the charge in the instant case.

service in averting abuse of treason charges as instruments of oppression. They have insisted upon careful definition of the offense, and strict requirements of proof, to the end that treason shall comprise only conduct truly aimed at the foundations of government—levying of war—or directed to securing the success of its external enemies—adhering to them, giving them aid and comfort.

Our advocacy in this case brings us into no conflict with these principles. We do not urge upon the Court a "liberal" or expansive construction of the constitutional definition, or a narrowing of its procedural safeguards. The controversies which have engaged the courts as to the types of conduct constituting treason have revolved around domestic disturbances, calling for careful balancing of the conflicting interests in individual freedom and civil liberties on the one hand and stability of government on the other. In this area, restrictive definition of the crime may well be dictated by the spirit of the Constitution.

But when the crime is actual adherence and giving aid and comfort to external enemies of the United States, the area of controversy is necessarily more limited. If the accused specifically intended to aid the enemy, and, with that intent, by action gave or attempted to give aid to them, decision whether his conduct should properly be punished as treason calls for no nice consideration of conflicting public policies. What he has done—

assuming he has done it—is the essence of treason, whether or not he succeeded in all that he intended to do. He still shares in the spirit as well as the letter of the constitutional guarantees, but his share is limited to the guarantees as to proof and punishment.

The petitioner asserts that the guarantees of strict and convincing proof call upon this Court to hold that the crime of treason by adherence to enemies, giving them aid and comfort, is not established unless the overt acts alleged and proved show on their face, without additional evidence, the treasonable intent with which they were committed, and—or perhaps in the alternative—that an overt act laid in the indictment and clearly proved is still insufficient unless it reaches beyond the stage of attempt to that of success. These assertions, we believe, lack substance both in history and in policy. We agree that strict and convincing proof is needed; and since this is the first treason conviction to come before this Court in its history, the Court may well feel that the occasion requires it to lay particular emphasis on the need for high standards of proof of specific intent as a protection against hysterical prosecutions and perjured convictions. By such means, we submit, rather than by the petitioner's proposed holdings, the Court can preserve the spirit of the treason clause of the Constitution without distorting the proper analysis of treason or perverting the his-

torical function of the overt act in the proof of that crime.

II

THE SUFFICIENCY OF THE OVERT ACTS INVOLVED IN THIS CASE, AND THE ADEQUACY OF THEIR PROOF

A. *Overt Acts 1, 2 and 10 Were Sufficient Overt Acts of Treason*

Our review of treason law in England and America, under Point I of this brief, leads us to the conclusion that treason by adhering to enemies is established if it is alleged and proved (1) that the defendant intended specifically to give aid and comfort to enemies of the United States, as such enemies; and (2) that he committed an act which put his intent into operation, whether or not it succeeded in accomplishing his intent. The act thus tending to effectuate the specific intent to aid and comfort the enemy must, of course, be proved by the testimony of two witnesses. We believe that by this proper test all three of the alleged overt acts submitted to the jury in this case were sufficient. They put into operation the petitioner's intent to give aid and comfort to the enemy, and they gave such aid and comfort.

The petitioner contends (Pet. II Br., p. 42) that the acts alleged "are not such acts as the proof of which, when accompanied with evidence of petitioner's allegiance to the United States and a traitorous intent would warrant submission of the case to the jury." Presumably, this criticism

is predicated upon the petitioner's further contention that the act of "meeting and talking with an enemy without more is not an act which on its face gives the enemy aid and comfort" (*ibid.*). We do not agree with the premise of the latter contention, that the act must "on its face give the enemy aid and comfort;" nor do we agree with the contention itself. It is sufficient, as we understand the law, if the act of "meeting and talking with an enemy" is an act in furtherance of, and undertaken for the purpose of effecting, a specific intent to give aid and comfort to the enemy.

So far as the form of the allegations is concerned, then, the three acts in question seem to us clearly sufficient. In each it is alleged that the petitioner performed a specific act—in overt acts 1 and 2 that he met or accompanied and "did * * * confer, treat, and counsel with" an enemy of the United States, and in overt act 10 that he "did give false information and make false statements" in itemized respects regarding an enemy of the United States. In each it is further alleged that the act was performed "for the purpose of giving and with intent to give aid and comfort to said enemy".[11] The trial adduced evi-

[11] The body of the indictment alleges that the petitioner "treasonably did adhere to the enemies of the United States, * * * giving to said enemies aid and comfort within the United States and elsewhere", and that the specific overt acts charged were committed "in the prosecution, performance, and execution of said treason and of said unlawful traitorous

dence that the acts alleged had been performed, and that in performing them the petitioner was forwarding the specific intent charged of giving aid and comfort to the enemy. Proof of these two elements, together with proof of petitioner's allegiance to the United States, clearly justified the submission of the case to the jury under proper instructions regarding the nature of the specific intent required.[72]

Although the several briefs filed naturally reflect some disagreement between the petitioner's understanding of the authorities and our own, the dominating note in the petitioner's position seems to be not so much analytical rejection of our view, as a feeling that there is something incongruous, or shocking, or at odds with American tradition, in treating as the grave crime of treason actions so ordinary-seeming as conversations, or misstatements to law enforcement officers (see Pet. II Br., pp. 42, 45). The implication is that an act should not be regarded as an overt act of treason unless the mere objective description of it carries sinister connotations, as with "giving the enemy intelligence, sending them provisions, selling them arms, treacherously surrendering a fortress and the like" (see Pet. II Br., p. 42).

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and treasonable adhering and giving aid and comfort to the enemies of the United States" (R. 2, 4).

[72] Except as the petitioner disagrees with the theory of the Government as to what is a sufficient overt act, we do not understand that any question is raised as to the adequacy of the instructions to the jury.

The petitioner neglects the fact that the techniques of warfare are no longer so elementary as in the periods which evoked his illustrations. Wars are no longer won merely by capturing fortresses. Moreover, his approach disregards the basic nature of treason, as a crime consisting of a specific intention to betray allegiance and to aid and comfort the enemy, carried into effect by an act done to accomplish the intention. Allegiance is the strongest and most fundamental obligation of an American citizen, and its planned, deliberate betrayal to an enemy at war with America is the gravest breach of that obligation which an American citizen can commit. What is there "at odds with American tradition" in holding to be treason *any* act by an American citizen done for the specific purpose and with the specific intent of aiding an enemy in a war against America? Degrees of culpability or obliquity in treason there may be, as in other crimes; their existence is recognized by the very statute under which the petitioner was convicted.[73] But the magnitude of the aid and

[73] As we pointed out in our first brief (pp. 63-64), recognition of such degrees is shown by the power conferred by the Constitution on Congress to "declare the Punishment of Treason" (Constitution, Art. III, sec. 3), and by the discretion which Congress under this power has conferred (Criminal Code, § 2, 18 U. S. C. 2) on the courts to fix penalties ranging from death down to imprisonment for only five years and fine of only $10,000.

comfort furnished or attempted affects only the severity of the penalty; it has no bearing on the fact of the commission of the crime. The crime was committed when the petitioner acted to put into effect his intention to betray his allegiance by giving aid and comfort to the enemy.

Moreover, we do not concede the insignificance—the lack of seriousness—which the petitioner seeks to attribute to the particular overt acts charged and in substance admitted here.[*] These acts cannot realistically be viewed in isolation, as "meeting and talking with an enemy without more" (Pet. II Br., p. 42), or "the mere making of a false statement which leads to nothing" (Pet. II Br., p. 45). They must be viewed in the context of the elaborate and detailed evidence presented to the jury, from which the jury was fully entitled to believe that the petitioner knew the hostile mission of the enemies with whom he was dealing, and that he acted to his utmost to help them in that mission in every way presented to him. We described these acts in their context in our first brief, and repetition may be unnecessary here. Nevertheless, we think it useful to summarize for the Court again at this point the setting in which the acts were laid, so as to illustrate the operative

[*] It is not now denied that the petitioner "actually, in the sense of physically, performed the acts alleged in the indictment." Pet. I, Br., p. 4.

significance which the jury was entitled to ascribe to them.[75]

The petitioner was charged with giving aid and comfort to Werner Thiel and Edward John Kerling, two of eight German saboteurs who landed on the eastern coast of this country in June, 1942, on a mission from the German government to damage or destroy the American light metal industry. Thiel and the petitioner had been close friends for many years. They had lived together and had been engaged in business together. From these associations the petitioner knew that Thiel was an alien enemy, and that his sympathies lay with Germany. He knew that Thiel had left the United States for Germany in March 1941 in anticipation of war between the two countries, and with the explicit desire to be on the German side in such a war. He corresponded with Thiel in Germany down to the date of Pearl Harbor, and the tenor of his letters revealed enthusiasm and admiration for the German cause.

In June of 1942 Thiel reappeared, mysteriously and furtively. His method of approach to the petitioner was in itself suspicious. A strange voice called petitioner's name from the hall of his rooming house, and on his failure to respond an unsigned note, in an unknown hand, was slipped under his door, directing him to meet

[75] The pertinent record references will be found in the similar passage at pp. 56–60 and 64–65 of our first brief.

"Franz from Chicago" at a named hour and place. Petitioner, though he testified that he knew no "Franz from Chicago", and had been unwilling even to answer the unknown voice calling him, nevertheless made his appearance at the rendezvous. "Franz" turned out to be Thiel. According to petitioner's own testimony he was startled, and asked several questions, only to be put off with evasive and noncommittal replies. They talked together for several hours, as a result of which petitioner, by his own admission, believed that Thiel had come on a mission for the German government, and that "whatever his mission was, I thought that he was serious in his undertaking."

Thiel mentioned the money which he had brought from Germany, and expressed reluctance at carrying it around with him. Petitioner offered to take charge of it and put it in his own safe deposit box. Thiel, while apparently agreeable to this, was still noncommittal, and nothing was done about it that night. They talked of Thiel's fiancee, Norma Kopp, and when Thiel expressed interest in her but seemed unwilling to get in touch with her directly, petitioner offered to write to her himself. Again, nothing was done that night. At Thiel's request they agreed to meet again the next night, not at petitioner's apartment, because Thiel had too many acquaintances there and did not want them to see him, but at the Twin Oaks Inn.

The meeting thus arranged, and begun the next evening at the Twin Oaks Inn and continued at Thompson's Cafeteria, constitutes the first and second overt acts charged. When they met at the Twin Oaks Inn, Thiel told petitioner that they were to be joined by Kerling, and that Kerling had come over with him from Germany. Kerling was in fact the leader of Thiel's group of saboteurs. Kerling joined them. He did not stay long. After he left, Thiel and the petitioner talked for some time, and then Thiel brought up the subject of the money. He went to the wash-room to take off his money belt. After they left the restaurant petitioner took the money belt and money from Thiel, and put them in his pocket. Thiel told him to take out the $200 which Thiel owed him, and also told him not to put all the rest in the safe deposit box, but to keep some in his room, so that he would not have to go to the bank all the time in the event Thiel had to call on him suddenly for some funds. Petitioner kept the money throughout the continuation of their conversation at Thompson's Cafeteria, and on returning to his apartment he put the money in a drawer and the money belt in his shoebox. The next evening he wrote Norma Kopp, as arranged with Thiel, asking her to come to New York for "great news," "a pleasant surprise," and "news of the most sensational nature," but cautiously avoided saying anything from which Thiel's arrival could be suspected. Thiel him-

self had suggested that no mention of his name be made in the letter. The following day petitioner put the bulk of Thiel's money in his safe deposit box.

In the light of the setting in which the meetings charged as overt acts 1 and 2 thus occurred, we submit that the meetings, marked as they were by friendly and earnest discussion by the petitioner and two known enemies of the United States, in themselves constituted aid and comfort to those enemies. Little imagination is required to perceive the advantage which such meetings would afford to enemy spies not yet detected. Even apart from the psychological comfort which the meetings furnished Thiel and Kerling by way of social intercourse with one who they had reason to believe would not report them to the authorities as a loyal citizen should, the meetings gave them a source of information and an avenue for contacts with others. The meetings enabled them to be seen in public with a citizen apparently above suspicion, and thereby to appear to be mingling normally with the citizens of the country with which they were at war.

But the significance of the meetings is by no means confined to these relatively intangible forms of aid and comfort to the enemy. The meetings had more content; they were part and parcel of a far more specific program. Peti-

tioner, though he might have not known the precise details of Thiel's mission, was fully aware of its seriousness, to such an extent that he warned Thiel that "anything that he might undertake would be ineffectual or useless". Thiel, on the other hand, needed a means to reach Norma Kopp without disclosing his presence. He needed a place to hide the money he had brought from Germany. He felt petitioner out on these matters at their first meeting, on June 22nd. He arranged a meeting between petitioner and his own leader, Kerling, which could have had but one purpose, approval of his course in accepting petitioner's assistance. Following the meeting with Kerling, Thiel entrusted his money to petitioner. From that moment on, petitioner, and not he, carried the large sum of money in gold notes. If they had been arrested as they walked to Thompson's Cafeteria, or as they continued their conversation there, possession of the money would have cast suspicion on petitioner, not on him. And if still later the money were to be found in petitioner's safe deposit box it would be petitioner, not he, who would have to explain its presence.

In fact, the money *was* later found in petitioner's safe deposit box, and it *was* he who had to explain it. When so pressed, he sought to explain it as his own, and when asked about Thiel he sought to camouflage him as a fictitious "William Thomas", who had not been out of the country

in over a year. These lies were the substance of the tenth overt act—false statements made, by the petitioner's own admission both on and off the stand, for the purpose of shielding Thiel's identity. That Thiel was already apprehended, and beyond his help, he did not know; but he did all he could.

It is a fact that the mission of Thiel and Kerling was nipped before the light metal industry could be destroyed; and by the same token the petitioner's aid and comfort fell short of producing for them successful accomplishment of their mission. But in anticipation of their mission, Thiel and Kerling, and their superiors in Germany, could hardly have hoped for more than that in the first few days after their arrival in New York they would be able to find a friend who would be willing to meet them, talk to them about their plans, hide their money for them,* and conceal their identity from the authorities in case of trouble. These things were the aid and comfort which in the initial stage of their mission they would have hoped and looked for, and which at that stage of their mission would have helped them most; and these were the things which the petitioner did for them. If he did them with specific intent to betray his allegiance to his country, and

* Hiding the money, though charged in the indictment as an overt act (R. 5-6), was not included in the overt acts submitted to the jury, and we refer to it not as an established overt act, but as part of the setting which gives significance to the overt acts upon which the conviction was based.

to give aid and comfort to its enemies, they are treason whether or not they sound as sinister as surrendering a fortress.

The petitioner protests with particular vigor (Pet. II Br., pp. 43–51) the acceptance of overt act 10 as a sufficient overt act of treason, not only on the ground that at the time of its commission the enemy was beyond aid and comfort,[11] but also on the ground of a peculiar unreliability in false statements to officers of the law as to the identity and whereabouts of confederates, especially when recanted a short time later. We recognize that words as such have generally been held insufficient to show that a treasonable intent has moved from thought to action. But here we have not mere words, but words used as an instrument to aid the enemy by diverting suspicion from him, and protecting him. These are not words as expression of belief or intent only, but words in action, offering by their utterance aid and comfort just as would words used to convey to an enemy secret military intelligence. And as to the other objections, they go not so much to the quality of the act charged as an act of treason, as they do to the certainty, as a matter of proof, whether the false

[11] As we pointed out in our first brief (p. 66, footnote 38), Thiel was not necessarily beyond aid merely because apprehended; petitioner's statements, if believed, might well have led to Thiel's being regarded as a draft-dodger only, rather than an enemy agent. We have made plain in the text that we do not in any event agree with the petitioner's proposed "success" test.

statements were made with the specific intent of giving aid and comfort to the enemy. They amount to a criticism that when false statements are made under such circumstances, it is very likely that the making of them does not represent a considered and specifically intended effort by the accused to aid the enemy. If that is so, the remedy, we believe, does not lie in rejecting the false statements as a legally sufficient overt act, but in great care in charging the jury as to the need for finding the requisite specific intent. When, as was the case here, the jury was properly charged that it could not convict the petitioner on the basis of this or any other overt act unless it was satisfied beyond a reasonable doubt that in performing the act he intended to aid Thiel and Kerling as enemies of the United States, and not merely out of personal friendship (R. 439, 440–441), the jury's verdict should, we submit, be permitted to conclude the question whether the false statements were sufficient to establish that treason had in fact been committed.

B. *Overt Acts 1, 2 and 10 Were Each Proved by Two Witnesses Within the Meaning of the Constitutional Requirement*

Our research into the history of the law of treason has thrown little further light on the precise meaning of the two-witness requirement, and we have substantially nothing to add to the discussion in our first brief (pp. 69–82), as to whether each

of the acts was proved by the testimony of two witnesses within the meaning of the constitutional requirement.

No question is raised as to the sufficiency of the proof of overt act 1, and we are not persuaded by petitioner's criticism of the proof of overt act 2. That act charged a meeting and conference with Thiel, for the purpose of giving him aid and comfort as an enemy. No time limits for the meeting were set in the indictment, nor was it charged that throughout the period of the meeting any particular matter was discussed. The meeting was laid as a single meeting, at two separate places, and the two same witnesses, Special Agents Rice and Willis of the Federal Bureau of Investigation, testified that the petitioner and Thiel met and were together at both those places. The petitioner's suggestion that one of the witnesses may not have testified to seeing the petitioner and Thiel together during all the time they were at one of the places is, we believe, factually incorrect,[*] but if it were

[*] The petitioner states (Pet. II Br., pp. 51–52) that Willis only testified "that petitioner and Thiel went into Thompson's Cafeteria, stayed there awhile having refreshment, and came out," and that he "did not testify that they were together while in Thompson's Cafeteria." But in fact Willis testified not only that they went into Thompson's Cafeteria and stayed there, but also that "from the time Cramer and Thiel left the Twin Oaks Inn, until they finally parted after leaving Thompson's cafeteria," he was "observing them all the while" (R. 102). His testimony could only have meant to the jury that he watched them together in the Cafeteria.

correct it would be immaterial. What the Government needed to prove, and what it did prove by the same two witnesses, was that Thiel and Cramer met and conferred, on a given evening, at two given locations. That they may also have been shown by the testimony of other witnesses to have met and conferred at the same places on the same evening is clearly irrelevant. Furthermore, the petitioner has adduced no authority, and we believe there is none, for concluding that an overt act of this character must be established in its entirety by the same two witnesses. Here, in fact, no less, and sometimes more, than three witnesses observed and testified to each portion of the meeting charged. We submit that by all known standards this proof is sufficient.[29]

As to overt act 10, the petitioner's second brief adds nothing new, and we rest on our contention in our first brief (pp. 74–75) that all the material portions of the alleged false statements were established by the testimony of two witnesses. We reiterate also our suggestion that in any event the testimony of the petitioner might well be regarded as supplying the deficiency of a witness, if a de-

[29] In his second brief (p. 52) the petitioner suggests that, assuming the same two witnesses must obser and testify to both parts of a divisible act, the addition of a third and cumulative witness to one part of the act vitiates the proof, since the jury might have believed the testimony of two different sets of witnesses to the two different parts. This is a *reductio ad absurdum* of the two-witness rule which we do not believe deserves comment.

ficiency existed. This suggestion has, so far as we can ascertain, never been discussed in the authorities, and our reasons for proposing it as a proper rule are fully set fort. in our first brief (pp. 75–79). The validity of the suggestion is not impaired by the cases cited by the petitioner,[50] which stand only for the indisputable propositions that neither testimony by a witness to the accused's admission out of court, nor testimony by the accused as to facts without admission of guilt, amounts to a confession within the meaning of the alternative constitutional requirement.

CONCLUSION

We respectfully submit that the petitioner's conviction was in accordance with the Constitution and the law of treason, and that his trial was in all respects properly conducted. Accordingly, the conviction should be affirmed.

CHARLES FAHY,
Solicitor General.
CHESTER T. LANE,
Special Assistant to the Attorney General.
NOVEMBER 1944.

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[50] Pet. II Br., pp. 56–58: *United States* v. *Magtibay*, 2 Philippine Reports 703, (1903); *United States* v. *Greiner*, Fed. Cas. No. 15,262, 26 Fed Cas. 36 (D. C. E. D. Pa.).

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